No. 10666

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FLORENCE DAVIS SMITH and HARVEY W. SMITH,
Appellants,

vs.

THE FEDERAL LAND BANK OF BERKELEY and FEDERAL FARM MORTGAGE CORPORATION,
Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

CHRONOLOGICAL HISTORY OF PRESENT PROCEEDINGS

July 21, 1942 — Petition and Motion of Appellees before the Conciliation Commissioner for authorization to sell the real property covered by the deeds of trust according to state law. (R. 24-38)

September 3, 1942 — Hearing before Conciliation Commissioner on said Petition and Motion. (R. 118-168)

December 17, 1942 — Denial by Conciliation Commissioner of Appellees' Petition and Motion.

January 8, 1943 — Petition by Appellee for review of Conciliation Commissioner's denial of said petition. (R. 48-56)

May 10, 1943 — Hearing on Petition for Review before Honorable Campbell E. Beaumont, District Judge.

July 9, 1943 — Memorandum Opinion and Order of Judge Beaumont overruling Conciliation Commissioner's denial of Appellees' Petition and Motion and authorizing

Appellees to exercise the power of sale contained in the deeds of trust. (R. 64-68)

September 17, 1943 — Findings of Fact, Conclusions of Law, and Order of Judge Beaumont in accordance with his Memorandum Opinion. (R. 68-74)

October 16, 1943 — Appellants' Motion for New Trial, Petition for Rehearing of Review of Order of Conciliation Commissioner (December 17, 1942) and Motion to Vacate Judgment, Order and Findings On Review (September 17, 1943). (R. 74-78)

October 25, 1943 — Hearing before Judge Beaumont on Appellants' Motion for New Trial, etc., and the Court's denial thereof. (R. 102-103)

October 27, 1943 — Appellants' Notice of Appeal filed covering both the "order and judgment" of September 17, 1943, and of October 25, 1943.

For further brief statement of facts see pages 61-62 of Transcript of Record.

JURISDICTION

Neither the Trial Court Nor This Court Could Take Jurisdiction Over Appellants' Motion for New Trial

Rule 59, Fed. Rules of Civ. Proc., govern such motions. Even without such Rule, it would be elementary that such a motion would have been proper only if addressed to the Conciliation Commissioner following the hearing before him on September 3, 1942. A motion for new *trial* may be entertained by the *trial* court but not by a reviewing court. It is too late to file such a motion after a decision on a petition for review. This is especially true, in such cases as this, where neither the reviewing court nor the moving party requested the introduction and consideration of further evidence.

Order Denying Petition for Rehearing Is Not Appealable

Appellants also included with their motion for new trial a "Petition for Rehearing of Review of Order of Commissioner Ginsburg Dated December 17, 1942." (R. 74-78) This petition was denied by Judge Beaumont on October 25, 1943. (R. 102-103) Appellants are here attempting to appeal from the order denying the rehearing.

> "The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal." (*Wayne United Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U.S. 131, 57 S.Ct. 382)

The Question Raised in Appellants' Sixth Assignment of Error Is Res Judicata

Appellants' sixth assignment of error is as follows:

> "6. The Court erred in holding that the term of Appellants' extension proposal expired on November 2, 1940."

The Conciliation Commissioner, in his Findings of Fact and Conclusions of Law, dated February 9, 1942 (R. 39-43), expressly found that:

> "Subject to the terms of the proposal, the debtors should have an extension for three years from the second day of November, 1937; that the term of said extension proposal has expired; . . . that the debtors are in default under the terms of said extension proposal; that the extension provided therein has terminated . . ."

The Appellees were authorized to foreclose.

No appeal was taken from this action of the Conciliation Commissioner.

Appellants now contend, in order to escape the results of not appealing from such Findings of Fact, Conclusions of

Law and Order of the Conciliation Commissioner, that the order was void for the reason that "the District Judge was the only one who had the power to permit a creditor to foreclose." (Appellants' Brief, p. 26)

We submit that the question is res judicata since no timely appeal was taken. A motion to re-open and review a proceeding, such as was made by the Appellants, can not be substituted for an appeal. *Wragg* v. *Federal Land Bank of New Orleans,* 63 S.Ct. 273.

Futhermore, the order of February 9, 1942, (R. 32) amounted to a relinquishment of the bankruptcy court's jurisdiction over the property which was subject to Appellees' deeds of trust. Even assuming such order was *erroneous,* the Supreme Court has on at least two occasions expressly stated that an erroneous order may be attacked *only on appeal. Union Joint Stock Land Bank of Detroit* v. *Byerly,* 60 S.Ct. 773; *Bernards* v. *Johnson,* 62 S.Ct. 30.

In the event this Court should decide that the question of the expiration of the extension agreement is a proper subject of inquiry, Appellees call attention to the only correct interpretation of the two portions of the extension proposal quoted by Appellants on page 25 of their brief. It is true that one of the headings reads:

"During Second, Third Years, *and Remaining Portion of said Extension.*"* However, the reason for the use of the emphasized portion of the heading becomes very obvious upon reading the body of the proposal, following said heading. It is as follows:

> "That during the second and third years of said proposal agreement and said extension, and during the balance *of any extended period given to these debtors* for the payment of their secured and unsecured claims, etc."

*Throughout brief all emphasis is added to quotations.

This clearly shows that the original period of the extension was three years, but that the debtors hoped that, if they made a satisfactory showing during the three years, an "extended period" might later be given to them. In other places in the proposal reference is made to "the term of this proposal agreement *and the extension period.*" (R. 11)

There is nothing in the record which shows that any extended period was ever given to these debtors.

ISSUE BEFORE THIS COURT

The sole question before this Court on Appellants' appeal is: Did the District Judge err in making and entering his order of September 17, 1943? Said order reads:

> "Wherefore, by reason of the aforesaid findings of fact and conclusions of law, it is ordered, adjudged and decreed that the findings of fact, conclusions of law and order dated December 17, 1942, made by Leonard M. Ginsburg, Conciliation Commissioner, acting as Referee, be and the same are hereby set aside and vacated;
>
> "It is further ordered, adjudged and decreed that the property described in paragraph II of the above findings of fact be stricken from the debtors' schedules, and that The Federal Land Bank of Berkeley and the Federal Farm Mortgage Corporation, or either of them, may proceed to have the power of sale in one or both of the deeds of trust hereinabove mentioned exercised in accordance with the laws of the state of California."

There being but the one issue, Appellants' Assignments of Error Nos. 2 and 6 pertain to matters which are not properly before this Court. The remaining assignments, Nos. 1, 3, 4 and 5 are all directed to the question of whether the court erred in basing said order on a waiver of Appellants' right to amend under Subsection (s). Although Appellees believe that Appellants *did not have the legal right* to file an amended petition and be adjudicated bankrupts under Sub-

section (s), and, therefore, had nothing to waive, the question of waiver will first be considered.

ARGUMENT

I

There Was an Express Waiver by Agreement

Appellants' first Assignment of Error reads as follows:

> "1. The District Court erred in holding that the letter of attorney, Frederick E. Stone dated March 21, 1941, and the Possession Agreement signed by Appellant, Florence Davis Smith on May 1, 1941, constituted a waiver of Appellants' rights to amend their petition under subsection (s) of Section 75 of the Bankruptcy Act."

On February 18, 1941, Appellees filed a Petition and Motion with the Conciliation Commissioner, (R. 92-99) which, although no part of the phase of the proceedings now before this Court, has a bearing thereon. A hearing on said Petition and Motion was held March 12, 1941. (R. 39) Appellants were represented by Attorney Frederick E. Stone. The petition was based upon the allegation that the period of the voluntary extension under Subsec. (a-r) had expired. Appellees sought authority to have the power of sale in their deeds of trust exercised.

On March 21, 1941, Attorney Stone wrote the letter (R. 166-167) which was the basis for Judge Beaumont's conclusion that the debtors had waived their right to file an amended petition under Subsection (s). The letter stated:

> "The matter of filing a petition under Subsection (s) has been thoroughly discussed with Mr. and Mrs. Smith, the above named debtors. They have concluded that they will abandon the property and simply let the matter go by default, if the Randolph Marketing Company and their agent, Mr. Omer Avery of this city can be

> protected as to the present grapefruit crop which is now on the trees . . . If you are willing to allow Mr. Avery to take the grapefruit crop now on the trees, the Smiths are willing to let the matter go any way that is satisfactory to you."

It is evident that the *Appellants* concluded not to file an amended petition under Subsection (s) "if the Randolph Marketing Company . . . can be protected as to the present grapefruit crop."

This was the only condition imposed by Appellants. They knew that Appellees intended to sell under their deeds of trust, or one of them, and that such sale might be made before the grapefruit crop, then on the trees, could be harvested. Under California law growing crops pass to a purchaser at a trustee's sale. *Penryn Fruit Co.* v. *Sherman-Worrell Fruit Co.*, 76 Pac. 484; *Phillips* v. *Pacific Land & Title Co.*, 2 P.(2d) 566.

In the letter of March 26, 1941, the attorney for Appellees replied to the above letter, and stated:

> "We hereby agree that . . . the Randolph Marketing Company shall have the right to enter upon the property, pick the grapefruit and retain from the proceeds thereof . . . the amount necessary to reimburse said marketing company . . ." (R. 35)

The debtors withdrew their opposition and consented to the Conciliation Commissioner's order. The Court so found in its order of February 9, 1942, as follows:

> "(3) That the debtors have consented that such relief as was demanded by the secured creditors in said petition and as may be deemed proper by this Court, may be granted." (R. 41)

The Court further ordered (R. 43) as follows:

> "Wherefore, by reason of the aforesaid Findings of Fact and Conclusions of Law, it is Ordered that The Federal

> Land Bank of Berkeley and the Federal Farm Mortgage Corporation, or either of them, may, with the consent of this Court, proceed to have the power of sale in one or both of the deeds of trust hereinabove mentioned exercised in accordance with the laws of the State of California."

Appellants contend (Appellants' Brief, p. 10) that the phrase "with the consent of this Court" might be construed to mean that, although the order was made by the "Court" (See Sec. 1(9) of the Chandler Act), a *further consent* of the court was contemplated. We submit that the phrase "*with the consent of this Court*" was included for the purpose of expressly *consenting* to the trustees' sales. No further order or consent was necessary.

Appellants assume that Appellees' Petition and Motion (R. 92-99) was filed in accordance with the procedure prescribed in Subsec. (o). It was not, and, therefore, the provisions of Subesc. (o) were not applicable. Subsec. (o) is applicable only "*after the filing of the petition*" and "*prior to the confirmation* or other disposition of the composition or extension proposal by the court." The extension proposal had been confirmed long before the filing of this petition. All hearings were *required* to be held before the Conciliation Commissioners. (Rule 220, Bankruptcy Rules, U.S. Dist. Ct., So. Dist. of Calif.)

In their first Assignment of Error Appellants say the District Court "erred in holding that the letter . . . *and* the Possession Agreement . . . constituted a waiver." The District Court did not so hold. Findings of Fact, XII, states that, by reason of the offer in the letter of March 21, 1941, and its acceptance, *the debtors waived their rights.* (R. 73) In his Memorandum Opinion and Order (R. 64-65) the District Judge did state that the waiver "is shown generally by the record and particularly by the letters . . . and the *execution* of the possession agreement by Florence Davis Smith." In

other words, the fact that *after* the exchange of the letters Florence Davis Smith *executed* the Possession Agreement supported his conclusion that there *had previously been* a waiver. (R. 65)

Although as heretofore stated no issues based upon the motion for new trial or petition for rehearing are properly before this Court, the record shows two other letters written by Attorney Stone, and one by Attorney Hoffmann, which Appellants brought to the attention of Judge Beaumont. From the order denying the motion for new trial and petition for rehearing (R. 102-103) it appears that Judge Beaumont did consider the three additional letters, as it was stated in the order that all evidence, both oral and documentary, filed in the matter was considered.

In the event this Court should determine that it may properly take into consideration these additional letters, Appellees will briefly discuss their effect. Rule 59 (b), Fed. Rules of Civ. Proc., permits a motion for new trial to be made *after ten days* on the sole ground of newly discovered evidence. Regardless of any claimed assurance made to Attorney Shirley, he and his client, who was in court with him, were bound to know what letters had been introduced in evidence. When Attorney Smith agreed that the entire *record* was in evidence, he was referring to everything in the Conciliation Commissioner's official file. This could not mislead the debtor or her attorney into believing that all "off the record" correspondence between her attorney and her creditors was a part of the record. The fact that, when Attorney Carter took over, "he obtained from *Appellants* carbons of two further letters which Mr. Stone sent to Mr. Hoffmann and the original of Mr. Hoffmann's reply of April 9, 1941," does not make the carbons and the letter, *which had been in the hands of his client,* newly discovered evidence.

Newly discovered evidence is material evidence for the

party filing the motion, which he could not, with reasonable diligence, have discovered and produced at the trial. Certainly the three additional letters were available to Attorney Shirley at the time of the trial. Evidently he did not use them because he did not consider them material. No claim is now made that the letters were not available at the time of the trial. The letters might have been new to Attorney Carter, who had just come into the case. To hold that these letters constituted newly discovered evidence would mean that, in order to get a new trial *out of time* in any case, all that would be necessary would be to substitute attorneys and have the new attorney state that he has a new theory of the case under which some additional evidence should have been introduced on behalf of the losing party.

Even if the letters were properly before this Court, there is nothing in them which would militate against Judge Beaumont's conclusions and order. The letter of March 27, 1941, written by Attorney Stone (R. 81) does not indicate any change in Appellants' decision not to file under Subsection (s). The attorney merely informed Appellees that he would notify them when his clients advised him whether they would enter into the agreement; that is, the Possession Agreement that was to be executed by Appellants only in furtherance of their decision "to let the matter go any way that is satisfactory to" Appellees.

The letter of April 3, 1941, from Attorney Stone proves that Appellants were considering only the probability of a settlement with Appellees, de hors the bankruptcy court, in view of the executed contract not to file under Subsection (s). Before signing the Possession Agreement they were exploring the possibility of a scale-down. On April 9, 1941, Appellees' attorney informed them of the impossibility of granting a voluntary scale-down and, therefore, "under the circumstances we feel that the decision made by the debtors . . . is the best solution of the difficulties, and we would like

to have the matter handled as suggested in our last letter," that is, in the way which was most satisfactory to Appellees, under an executed Possession Agreement, so that Appellees could immediately go on the property and protect it from further depreciation, "if Mr. and Mrs. Smith have not changed their minds" about letting "the matter go any way that is satisfactory to" Appellees, *not* about the filing of the petition under Subsection (s).

The whole question of waiver by the debtors is made conclusive, as indicated by Judge Beaumont, by the fact that, after *all* of the correspondence, Florence Davis Smith, the owner of the property, executed the Possession Agreement on May 1, 1941.

On page 13 of their brief Appellants note that the Conciliation Commissioner did not make a finding on the question of waiver, but in the next paragraph they refer to the rule which requires a reviewing court to follow the findings of the trial court unless "entirely erroneous." It is elementary that, where a trial court makes *no* finding on a fact, the reviewing court may and must make its own findings thereon. Therefore, the findings by the District Court on the question of waiver were unquestionably proper.

II.

There Was Adequate Consideration for the Express Waiver

Appellants' third Assignment of Error reads as follows:

> "3. The Court erred in finding that there was a binding agreement to waive the benefits of Subsection (s), since there was no consideration for said alleged agreement."

Appellants contend there was no valid consideration for any waiver agreement. Mr. Avery and the Randolph Marketing Company were permitted to pick the grapefruit crop and

retain all of the proceeds therefrom. The burden of showing a want of consideration lies with the party seeking to invalidate or avoid an instrument. In their brief Appellants state that the point—no consideration—"was made by Mr. Shirley at the hearing on September 3, 1942 (139)." On page 139 of the Transcript of Record it appears that Mr. Shirley stated that he was trying to prove "that there was no consideration for the agreement." This statement, of course, is no *proof* of any *fact*. The only other attempt made by Appellants in their brief to show factual proof of their contention is a reference to a statemnet made by Mrs. Smith (R. 149), and that "Mr. Shirley *stated* that the record showed the Randolph Marketing Company already had the right to market the fruit (R. 149)." Mrs. Smith's statement that "they" gave her no consideration is but a legal conclusion. Attorney Shirley's statement that "it is a matter of record in the court that the Randolph Marketing Company already had the right to market the crop" is not supported by any showing, either before the District Court or this Court. If it was a matter of record, Attorney Carter would certainly not have failed to include it in the one hundred seventy page transcript. Other parts of the record from the Conciliation Commissioner's office were procured by him for inclusion. (R. 91-92)

The record does not contain any order made by the Conciliation Commissioner authorizing the Randolph Marketing Company to make advances which would be repaid from the crop proceeds. No hearing was noticed or held as to the making of such order. No consent thereto was given by Appellees. Even receivers' certificates authorized by a bankruptcy court are not valid unless consented to by lienholders. *L. Maxcy Inc.* v. *Walker,* 119 F.(2d) 535. Under the circumstances, if Appellees had sold the security under a deed of trust before the grapefruit was harvested, the Randolph Marketing Company could not have come upon the property

and picked the grapefruit without the consent requested by Appellants in Attorney Stone's letter of March 21, 1941.

In support of their contention Appellants quote from a case from the Eighth Circuit. (*Buss* v. *Prudential Ins. Co.*, 126 F.(2d) 960, Appellants' Brief 17) The agreement in that case was entirely different. No consideration appeared on the face of the agreement, as in the instant case. Moreover, the quoted portion of the decision shows that lack of a showing of consideration was not the basis for the court's conclusion. The court stated that "There is no showing that the agreement was ever performed by either party to it."

In the instant case there has been full performance of the only demand made by Appellants; that is, the Randolph Marketing Company picked the grapefruit and retained the proceeds.

III

The Waiver Was Made by the Debtors, Not by Their Attorney

Appellants' fourth Assignment of Error reads as follows:

> "4. The Court erred in holding that Attorneys Frederick E. Stone and LeRoy McCormick had power by admissions to waive Appellants' rights to be adjudicated under Subsection (s)."

On page 19 of their brief Appellants cite cases from which it is clear they are attempting to fit the law applicable to one set of facts to an altogether different set of facts. The case at bar is not one where, without the clients' knowledge or authority, the *attorneys* sought to give away certain rights of their clients. A full and complete answer to this contention is the first two sentences in Attorney Stone's letter of March 21, 1941, which read:

> "The matter of filing a petition under subsection (s) has been thoroughly discussed with Mr. and Mrs. Smith,

the above named debtors. *They* have concluded that they will abandon the property and simply let the matter go by default if the Randolph Marketing Company and their agent, Mr. Omer Avery of this city can be protected as to the present grapefruit crop which is now on the trees."

IV

The Right to be Adjudged a Bankrupt Under Section 75(s) May be Waived

Appellants' fifth Assignment of Error reads as follows:

"5. The District Court erred in holding that the rights of Appellants as farmer-debtors to file an Amended Petition under subsection (s) of Section 75 of the Bankruptcy Act could be waived."

The cases from which Appellants quote on pages 20 and 21 of their brief state a rule of law which is not applicable to the facts of the instant case. The courts were considering cases where an agreement to waive the benefits of bankruptcy was demanded by the creditor and incorporated in and as a part of the *original* contract between the parties. This rule of law is analogous to the rule under which a mortgagor may not in the original contract agree to waive his right of redemption. However, it is a rule of universal application that the mortgagor may waive his right of redemption by a subsequent agreement with the mortgagee. For the same reasons a contracting party may not waive the benefits of bankruptcy in the original contract, but may *thereafter* do so by agreement. The *Borchard, Wright, Paradise* and *Corey* cases, cited by Appellants (page 20), are not in point. The *Borchard, Paradise* and *Corey* cases merely hold that, *after a debtor has properly amended under Subsection* (*s*), the statute prescribes an orderly procedure, and that the bankrupt and his creditors can not substitute different procedure from that prescribed in the statute.

In the *Corey* case this Court held that a debtor can not waive the procedure which the statute requires *the Court* to follow.

In the *Wright* case the debtor had not filed an offer of composition or extension, and the court simply held that his right to amend under Subsection (s) did not depend upon the diligence with which he sought to procure a composition or extension.

In the *Trego* case, cited and quoted from by Appellants on page 22 of their brief, the court found that there was *no agreement to waive* any rights under Section 75, and, therefore, any statements made by the court to the effect that an agreement "would have been void as against public policy" is mere dictum.

In the *Morrison* case, cited and quoted from on pages 23 and 24 of Appellants' brief, the mortgagor and mortgagee had agreed that the property should be operated by a receiver. The court held that, regardless of such agreement, "the debtors and creditors could not waive or modify *the provisions* of Section 75." Section 75 (s) (4) expressly provides that "if, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this title." Naturally the court held that the bankrupt was entitled to possession regardless of the fact that a receiver was in possession prior to the amendment under Subsection (s). There is nothing at all in the case involving the waiver of a right to amend under Subsection (s).

The *Hepker* case, cited and quoted from by Appellants on page 24 of their brief, comes within the rule we have been discussing. The question was whether the mortgagor was

bound to pay rental for a period agreed to by the mortgagor. The court said:

> "We think the statute and not the agreement *made six months before bankruptcy* must control."

The *one case* expressly involving the question of waiver of rights under Subsection (s) is *In re Denney,* 47 F. Supp. 36; 135 F.(2d) 184. This was one of the two cases relied upon by the District Court. (R. 65) The District Court's decision in the *Denney* case was affirmed by the Circuit Court of Appeals. (7th Cir.) Certiorari was denied by the Supreme Court of the United States on October 11, 1943. (64 S. Ct. 50. Rehearing denied November 8, 1943, 64 S. Ct. 155) The *Denney* case is, therefore, the *one final authority* on the question under discussion. The specific question of the validity of a waiver of rights under Section 75(s) was before the court, and in the following language the District Judge expressly held that such rights can be waived:

> "Surely a party litigant may waive his statutory rights, if he does so with full knowledge and has the benefit of competent counsel. Defendants in criminal actions may waive the Constitutional privilege of trial by jury or the right to be arraigned only after the return of an indictment by a grand jury. The Act of Congress known as the Frazier-Lemke Act, 11 U.S.C.A. § 203, was for the benefit of distressed farmers, who, in good faith, were trying to rehabilitate themselves. It was never intended to aid those who, by their acts, in and out of court, attempt to take advantage of its provisions, and give nothing in return. There is no rhyme or reason in holding that the rights extended under this law cannot, under any circumstances be waived."

The Circuit Court held that, while a debtor could not be forced to accept other procedure, as held in the *Borchard* and *Wright* cases, he could agree to waive certain rights, and his agreement was held to be binding. The court rejected

the proposition that a bankrupt is a ward of the court. In the *Denney* case the bankrupt had waived his right to a reappraisal. This is not a prescribed procedural step which is mandatory under the statute. The right to request a reappraisal is *discretionary* with the bankrupt. No cases have been cited by Appellants which hold that a debtor may not waive rights which it is within his discretion to accept or reject.

Section 75 (a-r) was first enacted by the Congress of the United States, and it was specifically provided that the petitioner should be designated "debtor" and not "bankrupt." The purpose of Congress was to provide a procedure under which distressed farmers might procure relief without the stigma of bankruptcy. It is contemplated under Subsection (s) that, if the distressed farmer can not procure the voluntary acceptance of a composition or extension proposal, he may then *elect* to amend his petition and be adjudicated bankrupt. *To hold that it would be against public policy for a debtor who has filed under Section 75 (a-r) to agree for a consideration that he would not become a bankrupt, and that he may not waive his right to be adjudicated bankrupt under Subsection (s) is, in effect, to say that all distressed farmers who file under Subsections (a-r) must ultimately amend under Subsection (s).*

Such an assertion would be tantamount to the contention that every distressed farmer who files under Subsections (a-r) will ultimately be forced to liquidation or to buy the property at the value fixed by appraisers, or by the court. This would prevent any voluntary settlement ever being made with creditors, which is the true purpose of Subsections (a-r). If one who had been adjudicated bankrupt under Subsection (s) felt that he no longer needed the benefits thereof, he would be precluded from filing a voluntary petition for dismissal under Section 59 (g) of the Chandler Act.

If Appellants are correct, it would be necessary for the court to say, upon the filing of a voluntary petition for dismissal:

> "It is against public policy for you to get out of Section 75. You must stay in and either be liquidated or pay *cash* for your property, even though you and all your creditors desire to have the proceedings dismissed."

The District Judge also cited, in support of his opinion, *Cole* v. *Home Owners' Loan Corporation*, 128 F.(2d) 803, a case decided by this Court, wherein it was held that a debtor can waive a right which is for his benefit. In support thereof this Court cited *Boynton* v. *Ball*, 121 U. S. 457, 467. The District Judge also cited many analogous rights which bankrupts have been held to have the right to waive. (R. 67)

V

The District Court's Order Is Sustainable on Grounds Other Than Waiver

The District Court's order of September 17, 1943, was that the property which is security for deeds of trust held by Appellees be stricken from the debtors' schedules, and that Appellees may proceed to have the power of sale in one or both of the deeds of trust exercised in accordance with the laws of the State of California. The order was based upon the fact that the debtors had waived their right to amend under Subsection (s). This was only one of the five separate grounds urged by Appellees for a reversal of the Conciliation Commissioner's order, as set forth in the Points and Authorities filed with the District Court. Reference to said five points was made by the District Judge in his Memorandum Opinion and Order. (R. 64) Where an order grants to a party the relief requested by him, he naturally would not appeal therefrom merely because the decision of the District Court was based upon but one of the several grounds, and the other alleged grounds were held to be insufficient. However,

upon the taking of an appeal by the adversary, the Appellee may in the Circuit Court again assert the additional grounds upon which the order might properly have been predicated, without cross-assignments and without cross-appeal. This rule of law was recognized by the Supreme Court of the United States in *United States, et al.* v. *American Railway Express Co., et al.,* 44 S. Ct. 560, 564, wherein, speaking through Mr. Justice Brandeis, the following statement was made:

> "The Southeastern insists that these claims, although adequately presented in the bill of complaint, cannot be availed of in this court, because they were overruled by the District Court and the American did not take a cross-appeal. The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."

This rule was also followed and, in fact, quoted by the Supreme Court in *Langnes* v. *Green,* 51 S. Ct. 243, 246, in an opinion delivered by Mr. Justice Sutherland.

Accordingly, Appellees again advance in this Court the arguments presented in the District Court on the additional

four grounds, on any one of which Appellees believe the order of the District Court may *and should be* affirmed.

VI

After the Expiration of a Voluntary Extension Proposal a Debtor May Not Become Aggrieved at It and Amend Under Subsection (s)

Section 75 (s) reads in part as follows:

> "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

It is not clear whether the debtor may feel aggrieved only *prior to* the confirmation of the composition or extension, or whether he may feel aggrieved *during* the period of an extension, or *after* the expiration of an extension. Since the provision is ambiguous as to when a debtor may feel aggrieved, the Court is forced to resort to well-established rules for determining the proper construction, and should therefore consider the history of the legislation, the legislative intention as indicated by statements made on behalf of the bill by its sponsors in the House and Senate, the legislative intention as indicated by similar legislation, the legislative intention as indicated by the Section as a whole, and as indicated by judicial construction.

A. History of the Legislation

Section 75 (a-r), known as the Debtor's Relief Act, became a law on March 3, 1933. It was then, as it is now, strictly emergency legislation. By its own terms it was to be in effect but five years. At the time of its enactment the United States was in one of its worst economic depressions.

In construing the provision under consideration the Court should consider the facts in retrospect, i.e., as they were when the legislation was enacted, rather than as they are at present. At that time Congress evidently assumed that the economic depression would be over before March 3, 1938. The legislators purposely avoided an adjudication in bankruptcy so that the farmer-debtors would not be faced with the stigma of bankruptcy. Any relief which the debtor might receive depended upon the voluntary action of a majority of his creditors in number and amount.

The sponsors of the legislation soon found that the farmer-debtors were receiving very little relief under this voluntary plan. Accordingly, they set out to put teeth into the Act so that there would be an incentive on the part of creditors to agree to a voluntary composition or extension. Congress, still feeling that relief without the stigma of bankruptcy was desirable, enacted the first Subsection (s), under which a debtor, whose creditors would not cooperate, although being forced to resort to bankruptcy, would nevertheless have five years in which to refinance. This amendment, which constituted the first Subsection (s) and the first Frazier-Lemke Act was later held to be unconstitutional.

Thereafter Congress enacted the present Frazier-Lemke Act. It became a law on August 28, 1935, and provided for a three-year stay. Had it not still been felt that a voluntary composition or extension was preferable, if it could be obtained by voluntary act of the creditors, it seems that Congress would have discarded the voluntary feature incorporated in Subsections (a-r) and merely provided for bankruptcy with the three-year moratorium. However, it must be borne in mind that under Subsection (s) a farmer-debtor must refinance within three years or he loses his farm, as well as all other non-exempt property. Since Congress assumed that the depression would be over by 1938, it very naturally assumed that the farmer-debtors would be able to save their

farms through voluntary extensions under Subsections (a-r), now that it had given the creditors an incentive to grant voluntary extensions rather than force the farmer-debtors to amend under Subsection (s).

When the second Subsection (s) was enacted, on August 28, 1935, several of the prior subsections were amended. This is further proof of the fact that Congress felt that the original purpose of The Deptor's Relief Act, that is, a composition or extension without the stigma of bankruptcy, was still desirable. It would certainly be a reflection on the intelligence of the legislators to conclude that they believed a debtor would be able to procure a *voluntary* extension from his creditors, and, *upon the expiration thereof,* amend under Subsection (s) and procure an *additional* three-year moratorium. The members of Congress would know that the creditors would not grant a voluntary extension if they knew that upon its expiration the three-year stay under Subsection (s) could be *forced* upon them. Congress would be bound to realize that, by making the relief under Subsection (s) absolute, it would be nullifying the whole effect of Subsections (a-r), and would be forcing all distressed farmer-debtors to be adjudicated bankrupts under Subsection (s). With this knowledge, it would not have bothered to amend the several subsections which provide for the debtors' relief under Subsections (a-r).

It is fundamental that, if possible, a statute will be construed by the courts so as to give meaning and effect to each and every part thereof. Should the courts hold that a debtor may procure the full benefits of a *voluntary* extension from his creditors and after the expiration thereof amend under Subsection (s) and procure the full benefits of an *enforced* extension, the result would be to deprive farmer-debtors of the right to effect compositions or extensions without the stigma of bankruptcy, as such a ruling would surely result in the refusal of all creditors to give any consideration what-

soever to offers under Subsections (a-r). As previously stated, the facts should be viewed in retrospect. Suppose this question had been presented to the courts shortly after the second Frazier-Lemke Act went into effect in 1935. It is inconceivable that a court would then have handed down a decision which would have wholly nullified the effect, and deprived the farmer-debtors, of what Congress clearly intended to be the preferable relief. In considering the question at this time a court might easily lose sight of the fact that there was a depression, and that many farmer-debtors saved their farms under Subsections (a-r) where they would certainly have lost them under Subsection (s).

Mr. Justice Douglas, in *Wright* v. *Union Central Life Insurance Co.*, 311 U. S. 273, 61 S. Ct. 196, said:

> "The Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (John Hancock Mutual Life Ins. Co. v. Bartels, supra; Kalb v. Feuerstein, supra), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

It is submitted that the benefits of Subsections (a-r) will be thus "frittered away" if the relief under Subsection (s) is held to be absolute and cumulative.

B. Legislative Intention as Indicated by Committee Reports and Statements in Congress Pertaining to the First Frazier-Lemke Act

The report of the Committee on the Judiciary and the statements made in Congress when the original Section 75 (s) was being considered, shed significant light on the question as to whether Congress intended that a farmer-debtor should have the full benefits of a voluntary composition or extension under Subsections (a-r), and after the expiration of such extension should then have the full benefits of Subsec-

tion (s). In speaking on behalf of the Bill, *Representative Jones, (Texas)* said:

> "The real compulsory feature of the bill is to the effect that *if* the lien holder and the owner of the land *cannot agree on a program as set out in the bill* (75-*a*-*r*), or some other program, *then* the owner of the land has the right to appeal to the bankruptcy court, and under the control of that court, foreclosure is forbidden for a period of five years, on condition that a reasonable rental be paid during that period . . ." (Cong. Rec. V78, Part 11, Page 12131.)

Representative Lloyd, (Washington) said:

> "By the passage of this act we are simply making workable the bankruptcy act which is already existing law. We are providing a means whereby the farmer may avail himself of an existing law passed by a preceding Congress that was intended to benefit him. (Comment: Unquestionably this refers to The Debtor's Relief Act.)
>
> "Under the law as it now exists, the farmer who cannot pay his debts and avails himself of the bankruptcy act must submit to the rules and regulations laid down by the conciliators appointed. These conciliators may, and often do, in the broad discretionary power conferred on them by the law, make *terms and conditions which the farmers cannot meet*. By this act it is our intent and purpose to provide an honest remedy for the creditor and to provide, too, some method by which the honest farmer . . . may save his home . . ." (Cong. Rec. V78, Part 11, Page 12131.)

Representative Lemke, (North Dakota) co-author said:

> "Therefore I respectfully submit that H. R. 9865 is constitutional, *that in case the debtor and creditor cannot get together and conciliate under Section 75*, it provides an honest and efficient method of scaling down indebtedness . . ." (Cong. Rec. V78, Part 11, Page 12136.)

House of Representatives Report No. 1898, 73rd Congress, Second Session, contains the following statement from the Committee on the Judiciary:

> "In brief the proposed legislation provides that a farmer, *whose efforts under the present agricultural composition section of the bankruptcy act to secure an adjustment of his indebtedness have failed,* may amend his petition, etc. . ."

These statements, by those speaking on behalf of the Bill, and in the Committee reports, clearly show that the purpose of Subsection (s) was to make workable the provisions of Subsections (a-r), under which the debtor could procure relief only if voluntarily agreed to by the majority of his creditors. There were no statements whatsoever indicating a contrary intention. Subsection (s) was considered as a "compulsory" feature, which would give the creditors an incentive to accept a debtor's offer of composition or extension, since the failure to accept such offers would give the debtors the right to amend under Subsection (s) and procure an extension, regardless of the wishes of the creditors. In other words, what Congress intended to do in enacting Subsection (s) was to put some *teeth* in The Debtor's Relief Act.

The first sentence of the original Subsection (s), enacted June 28, 1934, read exactly as does the first sentence of the present Section 75(s), enacted August 28, 1935, and the purpose of the second Subsection (s) is exactly the same as the purpose of the original Subsection (s).

C. Legislative Intention as Indicated by the Present Frazier-Lemke Act

The statements made in Congress on behalf of the second Subsection (s) give no intimation of an intention to make the relief provided therein cumulative to that provided in Subsections (a-r). In fact, three years was expressly provided as sufficient time in which to refinance. If a three-year mora-

torium was considered sufficient for a debtor who *failed* to procure the acceptance of an offer, what reason is there to assume that Congress felt that a debtor who had *succeeded* in procuring a voluntary extension, which might very well have been for three years or more, needed an additional three-year moratorium? It is reasonable to assume that Congress did not intend to grant the debtor, who was *successful* in procuring the acceptance of an offer, substantially more time in which to adjust his affairs than would be available to a debtor who *failed* to procure a voluntary extension.

Again we quote a portion of the provision under consideration:

> "Or if he feels aggrieved by the composition and/or extension, may amend his petition or answer."

Unless Congress intended that the debtor must show good cause for feeling "aggrieved," and unless the courts require such a showing, the word "aggrieved" means nothing, and the sentence would have been worded something like this:

> "*Regardless* of whether a farmer procures the acceptance and full benefits of a composition and/or extension, he may at any time amend his petition or answer, asking to be adjudged a bankrupt and thereupon procure the full benefits of this Subsection."

It is unbelievable that Congress would have set out *two directly opposite* conditions precedent—i.e., if he does, or if he does not procure a voluntary extension—if it intended that the debtor should have the unconditional right to amend at any time.

Considering the provisions from the viewpoint of creditor cooperation, it would be construed in this manner if Appellants' contention is correct:

> "If the creditors of a distressed farmer are *not* coopera-

tive and *refuse to voluntarily grant a three-year extension,* the farmer may be adjudged bankrupt and procure the statutory three-year moratorium *in lieu* thereof, but, if the creditors *are* cooperative and *do grant a voluntary three-year extension,* the debtor may, after the expiration thereof, be adjudicated bankrupt, and procure the statutory three-year moratorium in *addition* thereto."

Such a construction places a premium on non-cooperation and penalizes the creditors who cooperate.

D. Legislative Intention as Indicated by the Express Wording of Subsections (a-r), Considered as a Whole

Several provisions of Section 75 also prove that Congress did not intend that the relief provided for in Subsections (a-r) and the relief provided for in Subsection (s) should be cumulative and consecutive. In fact, they prove an absolutely contrary intention.

Section 75 (c) specifically provides that "at any time prior to (March 4, 1946) a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it desirable *to effect a composition or an extension of time to pay his debts.*"

Subsection (k) provides that a confirmed extension proposal shall be binding on the debtor and his creditors. This means that the proposal becomes a binding contract between the parties.

Subsection (o) provides that certain actions shall not be instituted or maintained against the debtor "at any time *after* the filing of the petition under this section *and prior to the confirmation* or other disposition of the composition or extension proposal by this court."

Subsection (l) provides that upon the confirmation of an

extension proposal, the court may dismiss the proceedings "or retain jurisdiction of the farmer and his property *during the period of the extension* in order to protect and preserve the estate *and enforce through the conciliation commissioner the terms of the extension proposal.*"

These subsections show that Congress had in mind a very definite plan under which a farmer-debtor files a petition for the purpose of *effecting* a composition or extension of his debts, and, after he has succeeded in his purpose, Subsection (k) makes the extension proposal a binding agreement between the debtor and his creditors. In other words, this agreement is substituted, in so far as applicable, for the original agreements between the debtor and his creditors. The automatic stay under Subsection (o) ceases upon "the confirmation or other disposition of the composition or extension proposal by the court." The reason for this is very apparent, as the intention was to provide an automatic stay—Subsection (o)—to afford the debtor an opportunity "to effect a composition or extension"—Subsection (c)—which would become the binding and substituted agreement after confirmation by the court—Subsection (k). After such binding agreement had been substituted, Congress felt that the parties would then carry on under the new agreement, and that there was no need for the further automatic stay.

Congress further provided in Subsection (l) that, upon the confirmation of an extension proposal the court might dismiss the proceedings or retain jurisdiction "*during the period of the extension in order to protect and preserve the estate and enforce* through the conciliation commissioner *the terms of the extension proposal.*" It will be noted that jurisdiction was only to be retained *during the period of the extension* and then *solely* for the benefit of the creditors. Section 75 contains absolutely no provision for retaining jurisdiction after the confirmation of a proposal, except "*during the period of the extension,*" and no provision what-

soever for retaining jurisdiction *after* the period of the extension expires. The express wording of these subsections makes it absolutely certain that Congress did not intend that a debtor could *amend* a petition *after* the court's jurisdiction thereunder had ceased. The provision of Subsection (s) is that the debtor may "amend his petition." This contemplates that there will be a *pending* petition. As the Act does not provide that the court shall retain jurisdiction after the extension expires, it follows that there should be no petition to *amend* after a voluntary extension has expired.

There is additional proof of this in the express words of Subsection (l), which are as follows:

> "The court may, after hearing and for good cause shown, *at any time during the period covered by an extension proposal that has been confirmed by the court,* set the same aside, *reinstate the case* and modify the terms of the extension proposal."

Here Congress provided for the reinstatement of a case which had been dismissed upon the confirmation of the extension proposal, but this right to reinstate exists only "*during the period covered by an extension proposal.*" Very definitely Congress gave the bankruptcy court control by reinstatement only *during the period of the extension.* No right to reinstate *after* the extension expires is provided in the Section.

E. Judicial Construction

The Conciliation Commissioner and the District Judge each appear to have believed that, by reason of this Court's decision in *Cohan* v. *Elder,* 118 F.(2d) 850, he was bound to hold against Appellees' contention on the point under consideration. Appellees do not understand this Court to have held that Congress intended that a debtor should be entitled to the benefits of Subsection (s) whether or not he has re-

ceived the *full* benefit of a voluntary extension. In the *Elder* case the extension had *not expired,* and, therefore, the decision is not authority for the proposition that a debtor may amend *after* an extension proposal has terminated. This Court held that, *if a debtor finds that he is unable to carry out the terms of an extension proposal which he submits and which is confirmed,* he may feel aggrieved and amend under Subsection (s). The decision is very defiite on this point, as the Court said:

> "Congress apparently anticipated that a plan might prove unworkable *upon a trial of it* and therefore provided for an adjudication on petition of the aggrieved debtor notwithstanding the acceptance and confirmation of his own proposal."

The fact that a debtor might find the terms of a voluntary extension too burdensome for him to fulfill and therefore "upon a trial of it" should find it unworkable and should be aggrieved at it is a reasonable and sensible construction of the provision.

The United States Supreme Court has thrice had occasion to refer to the rights of a debtor under the two procedures, although it has not had under consideration the exact question here presented. In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555; 55 S. Ct. 854, Mr. Justice Brandeis said:

> "That Act provides, among other things, that a farmer who has *failed* to obtain the consents requisite to a composition under §75 of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire alternative options in respect to mortgaged property."

In *Adair* v. *Bank of America,* 303 U. S. 350; 58 S. Ct. 594, Mr. Justice Reed said:

> "Upon *failure* of composition and extension, further opportunity for rehabilitation is afforded the debtor,

through provisions enabling him to retain possession of his property, under conditions favorable to its ultimate redemption by him. These steps are carried out under judicial supervision, subsection (s)."

In *John Hancock Mutual Life Insurance Company* v. *Bartels,* 308 U. S. 180; 60 S. Ct. 221, speaking through Mr. Chief Justice Hughes, the United States Supreme Court said:

"Subsection s of Section 75 as amended by the Act of August 28, 1935, prescribed a definite course of procedure. That subsection applies explicitly to a case of a farmer who has *failed* to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts. That was Bartels' situation. Provisions for proceedings by a farmer to obtain a composition or extension, when he is insolvent or unable to pay his debts as they mature, are found in subsections a to r of Section 75, 11 U.S.C.A. § 203, subs. a to r. . . According to the report of the conciliation commissioner, to whom the matter was referred according to the statute, Bartels had appeared at the meeting of the creditors and had submitted to a detailed examination concerning his financial condition . . . He succeeded in obtaining an agreement with certain unsecured creditors for an extension but the secured creditor refused consent, as Bartels could not meet all his arrears. Bartels was thus precisely in the condition prescribed in subsection s . . .

"The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors, subsections a to r, and, *failing this,* to ask for the other relief afforded by subsection s."

In *Harris* v. *Zion Savings Bank and Trust Company,* 63 S. Ct. 354, Mr. Justice Douglas, in a dissenting opinion in which Mr. Justice Black and Mr. Justice Murphy joined, and

in which said Justices contended for a broader interpretation for the benefit of farmer-debtors than was conceded, said:

> "The offer of composition made by the decedent before her death might or might not have been accepted. But even though it were rejected, Subsection (s) affords an *alternative* form of relief, one benefit of which is discharge."

From these three decisions it is very evident that the United States Supreme Court has considered Subsection (s) as *alternative* relief rather than as *cumulative* relief. There are no appellate court cases wherein the courts have indicated, even by dictum, that the relief is cumulative.

Because it appears to be a rather general understanding on the part of debtors, creditors, conciliation commissioners, and the District Courts in the Ninth Circuit, that the *Elder* case is authority for the proposition that debtors, who have received the full benefits of Subsections (a-r), may, after the expiration of the voluntary extension, wait until some creditor takes an affirmative step to terminate the matter, and thereupon amend under Subsection (s), Appellees are particularly desirous of procuring a decision herein which will clarify for debtors and creditors, as well as for conciliation commissioners and District Courts in the Ninth Circuit, the effect of the *Elder* case. The instant case affords an excellent opportunity to definitely determine on pertinent facts whether the *Elder* case, which was based upon facts that would make the construction placed placed upon it by the Conciliation Commissioner and the District Judge in this case only dictum, shall be the guide by which creditors decide whether to grant voluntary extensions, or, realizing that the Subsection (s) procedure will be available even after such extension expires, refuse to grant a voluntary extension and force the debtors under Subsection (s) without the additional delay.

VII

The Debtors Procured the Full Consideration to Which They Were Entitled Under Their Extension Proposal, and It Is a Cardinal Maxim of Equity that He Who Takes the Benefit Must Bear the Burden

If we consider in the instant case what the debtors received under their extension proposal, the conclusion that they could not be aggrieved thereby, factually or legally, becomes exceedingly obvious. Without the petition under Section 75, their property might have been sold under the terms of their deeds of trust years ago. The purchasers would thereupon have been entitled to possession. However, because of the voluntary extension granted by the creditors, the debtors have been permitted to retain possession of their property for many years. Their right to retain possession under the proposal ended November 2, 1940, if not earlier, because of defaults. Therefore, according to Subsection (k), there was a binding agreement under which the maximum consideration running to the debtors was possession until November 2, 1940. The binding agreement resulting from the confirmed proposal was, in effect, a lease. The debtors were in the position of a tenant who has had full possession under a lease, and, after the expiration thereof, seeks to have it rescinded on the ground that he, *the tenant*, failed to pay the rental. Under such circumstances it is impossible to see how the tenant could have become aggrieved *after* the expiration of his lease.

In the extension agreement it was contemplated that substantial payments would be made to these Appellees during the three-year voluntary stay. As a matter of fact, not one cent was paid thereunder to Appellees. The debtors, therefore, received everything they bargained for, but Appellees received nothing. Can there be any possible merit to the debtors' contention that *they* are the ones aggrieved at the extension? One needs but very little experience with human

nature to know that a man often feels aggrieved by his burdens, *but not by his benefits.*

It would be contrary to any law of contracts that has yet been advanced if it should be held that a debtor may enter into a binding contract or extension,—Subsection (k)—*procure the full benefits thereof,* and thereafter become aggrieved at what he had received and rescind the contract without returning the consideration, which, in this case, was the extension he received, which can not be returned.

If we consider what a debtor can procure under Subsections (a-r), the fact that *only alternative* relief was intended under Subsection (s) becomes a logical certainty. Subsection (k), as amended on August 28, 1935, permits the reduction of liens to the fair and reasonable market value of the property, and unlimited reduction of interest. Now, let us consider a below-the-average farmer with plenty of debts, who, during prosperous times, borrowed most of the money to purchase a farm. (It could be that he borrowed the life insurance money from a widow with several minor children, and interest on this money was their only source of income.) Along comes a depression, with farm values greatly depressed. The farmer files under Section 75. His other debts constitute a majority in number and amount. He asks for a five-year extension, *and that the lien be reduced to one-half of the secured debt,* which, at the time, may represent the market value of the farm—since there is no market for any farms. He offers to pay one-half of one per cent interest on the reduced amount each year. The offer is accepted by a majority of creditors in number and amount, exclusive of the secured creditor, and confirmed. The debtor would be within his legal rights to retain possession for five years, and the debt would be legally reduced to one-half the amount he borrowed. Would any court believe a debtor who claimed to be aggrieved at such an extension?

Subsection (s) provides for the amended petition if the farmer "feels aggrieved by the *composition* and/or extension." If a debtor may feel aggrieved after an extension expires, he may feel aggrieved *after a composition has been consummated*. The absurdity of permitting him to become aggrieved at a fully executed *extension* proposal is further demonstrated if we consider the effect of his becoming aggrieved at a fully executed *composition*. For example: If a debtor is able to effect a *composition* rather than an *extension* and thereunder pays each creditor, say fifty cents on the dollar, and the composition is confirmed by the court and payment made to each creditor, certainly it would not be held that the debtor might become aggrieved at the composition a few months or years later, require each creditor to refund the payments made to him, and thereupon amend and procure the benefits of Subsection (s). However, the Subsection permits an amendment upon being aggrieved at a *composition* as well as at an *extension*, and there is no more legal basis for holding that he may amend after an extension has been completed than after a composition has been completed.

VIII

If a Debtor Has a Right to Become Aggrieved at an Extension Proposal, the Terms of Which Are Going To Be Too Burdensome for Him To Fulfill, He Must File His Amended Petition Within a Reasonable Time

As provided in Subsection (k), a confirmed extension proposal becomes a binding contract between the debtor and his creditors. This contract supersedes the prior agreement between the parties. The prior agreement was, of course, enforceable under the state law. There is no reason to assume that the substituted contract would not also be enforceable under the state law. The result is that the confirmed extension proposal is governed by the state law, as was the original.

Section 1691, California Civil Code, provides that, when a party desires to rescind a contract, he shall do so *promptly* upon discovering the facts which entitle him to rescind. If a debtor becomes aggrieved at his extension while it is still in effect, that is, if he finds that he will be unable to make the payments which will entitle him to the full extension, he cannot withhold that fact from the creditors, harbor his grievance, accept further benefits under the new contract, (i.e., further extension) and then, when he has received the *full* benefits, make known his grievance and procure what Congress unquestionably intended as alternative relief under Subsection (s). If the statute is properly construed to mean that, if "after a trial," *Cohan* v. *Elder, supra,* the debtor becomes aggrieved at his confirmed extension proposal, he may amend under Subsection (s), it is not necessary to go beyond common sense to determine that he must make his grievance known promptly. There is no other way in which the creditors' rights could be prevented from being "frittered away." A fortiori, if a debtor has the right to amend *after* the expiration of his extension, he must make his grievance known promptly.

In the instant case the extension expired on November 2, 1940. Not a word was heard from the debtors indicating that they felt aggrieved either before or after the expiration. If a proper construction of the Act does not require the debtor to use diligence in manifesting his grievance, the whole burden of the expedient operation of the Act falls upon the creditors. The reason for this would be hard to grasp, but, if true, when a creditor comes into court and asks leave to foreclose, this, at least, should be a signal to the debtor to make up his mind what he wants to do. What else can a creditor do to protect *his* rights? If the present adjudication is allowed to stand, it will likely be a minimum of four years before the moratorium is over. Is the power vested in Congress to pass laws "on the subject of bankruptcies" broad enough to permit a procedure under which a debtor,

in total disregard of the rights of his creditors, may successfully stay the creditors' legal rights for a period of nearly eight years? *In re Wilkins,* 5 F. Supp. 131, Judge Bourquin said in part:

> "... the power to legislate 'on the subject of Bankruptcies' is not power to embrace therein by mere legal label, characterization, form, or forum what is not of, or is foreign to, bankruptcy. Labels, names, go for nothing."

It would seem that the courts should have the power to determine whether the grievance is reasonable or merely a subterfuge for the purpose of obtaining additional relief. If not made known by the debtor until the creditor takes some action to protect his rights, it would appear that the debtor is aggrieved at the attempted interruption of his tranquil and costless possession under the jurisdiction of the bankruptcy court, rather than at the extension, which, as in this case, expired more than a year and a half before the debtors filed their amended petition. Had Appellees waited five years before filing their petition, could the debtors *then* file an amended petition saying they "feel aggrieved" at the extension which expired six and one-half years ago? Neither *Wright* v. *Logan,* 315 U. S. 139; 62 S. Ct. 508, nor *Borchard* v. *California Bank,* 310 U. S. 311; 60 S. Ct. 957, is any authority whatsoever in the present controversy, as in those cases the debtor failed to procure a *voluntary* composition or extension under Section 75 (a-r).

IX

The Conciliation Commissioner's Order of February 9, 1942, Is Not Affected by the Adjudication Under Subsection (s)

Before the debtors filed their amended petition, the Conciliation Commissioner had made and entered an order granting leave to foreclose the deeds of trust held by Appellees. *No appeal was taken from said order.* In *Bernards* v. *Johnson,*

314 U. S. 19; 62 S. Ct. 30, the United States Supreme Court said:

> "The orders and decrees entered by the bankruptcy court, if valid, relieved the respondents, as mortgagees, of any disability to pursue their foreclosure suits arising out of the pendency of the bankruptcy proceeding *and left them free to prosecute the foreclosures in the state courts. However erroneous the challenged orders, the remedy for their correction was by timely appeal.* Since the District Court refused to review these orders and decrees out of time, the petitioners could not attack them in the Circuit Court of Appeals."

Since an order can not be attacked, except by timely review or appeal, it follows that the subsequent adjudication under Subsection (s) did not affect the order of February 9, 1942. A petition under Subsections (a-r) followed, in a proper case, by an amended petition and adjudication under Subsection (s) is but one proceeding in bankruptcy. It is upon the filing of the *original* petition that the bankruptcy court acquires full and exclusive jurisdiction over the debtor and his property. The provisions for this exclusive jurisdiction are in Subsection (n), not Subsection (s). In *Kalb* v. *Feuerstein*, 308 U. S. 433; 60 S. Ct. 343, the United States Supreme Court very clearly established the fact that the exclusive jurisdiction of the bankruptcy court is acquired upon the filing of the *original petition,* and that the injunctions against proceedings in the state court are in Subsections (o) and (p). After quoting from Subsections (n), (o) and (p) the Court said:

> "Thus Congress repeatedly stated its unequivocal purpose to prohibit—*in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition*—a mortgagee or any court from instituting, or maintaining if already instituted, any proceeding against the farmer to sell under mortgage foreclosure, to confirm such a sale, or to dispossess under it."

In the instant case the bankruptcy court did consent and surrendered its jurisdiction over Appellees' security by the order of February 9, 1942. It had no jurisdiction over said property thereafter, and there is nothing in Subsection (s) which even suggests that an adjudication thereunder brings back to the court jurisdiction previously surrendered. To hold to the contrary would be analogous to holding that, when the bankruptcy court, in general bankruptcy, consents to the foreclosure of a mortgage in a state court, the consent is immediately nullified because the bankrupt still has a justiciable interest in the property.

The District Court held against Appellees on this particular point because of *Brinton* v. *Federal Land Bank of Berkeley,* 129 F.(2d) 740, wherein the Circuit Court of Appeals, Tenth Circuit, held that, although the bankruptcy court had consented to the foreclosure of a mortgage in the state court in an order made while the debtor was under Subsections (a-r), such order had no effect after an amendment under Subsection (s) because the debtor still had a justiciable interest in the property at the time of adjudication. As the Circuit Court of Appeals held in favor of the secured creditor on another point, the above holding was not questioned on appeal. It is submitted, however, that the Circuit Court failed to take into consideration the fact that *proceedings under (a-r) and under Subsection (s) constitute but one proceeding before the bankruptcy court.* When this fact is kept in mind, together with the further fact that an order was made authorizing the secured creditor to proceed with foreclosure in the state court, i.e., consenting that the state court should take jurisdiction, and together with the further fact that there was no review or appeal from the order granting leave to foreclose, it will be seen that to hold that at the time of adjudication under Subsection (s) the debtors had a justiciable interest in the property was wholly beside the point. Such a holding would mean that, if an order was made which under all of the rules of the court had become final

and not subject to either direct or collateral attack, some further step in the proceeding could have the effect of nullifying such order without a rehearing, review, appeal or order setting aside and vacating such order. True, the debtors had a justiciable interest in the property at the time of adjudication. They also had a justiciable interest in the property the day after the order granting leave to foreclose was entered and the day after the final time for review or appeal expired, but a mere justiciable interest in the property under the bankruptcy court's jurisdiction does not have the effect of *nullifying orders* made by the bankruptcy court in respect to such property.

What has just been said is wholly and completely substantiated by the decision in *In re Casaudoumecq,* 46 F. Supp. 718, recently handed down by the United States District Court, Southern District, California, in a case where on March 20, 1942, the mortgagee filed with the court its "petition for leave to enforce chattel mortgage." On March 23, 1942, an order was entered permitting foreclosure of the mortgage, and on May 5, 1942, the debtor was adjudicated bankrupt under Section 75 (s). This is the exact continuity of the orders and adjudication in the instant case. Judge Ralph E. Jenny said:

> "The adjudication of the debtor as a bankrupt under subdivision s of Section 75 came *after the time for appeal from the order* of foreclosure of March 23rd *had elapsed.* What effect did this adjudication have upon that order? *A debtor's proceedings under sub. s are but a continuation of proceedings under the other provisions of Section 75, subs. a-r;* and, if the original petition, as here, was sufficient to show the jurisdiction of the court (particularly that the debtor was a farmer within the meaning of the act), *such jurisdiction continues.* Leonard v. Bennett, 9 Cir., 116 F. 2d 128, 44 A.B.R., N.S. 745; In re Brown, D.C.S.C. Iowa, 21 F. Supp. 935, 36 A.B.R., N.S., 828. In the case of Potter v. Union Central Life Ins. Co., 6 Cir., 111 F. 2d 145, 42 A.B.R., N.S., 880, it was held that the statutory stay of fore-

closure proceedings pending against a debtor's property, provided for in Section 75, sub. o, should not be vacated upon a motion filed by the mortgagee prior to the debtor's adjudication under sub. s, and before the debtor has had any reasonable opportunity to demonstrate the possibility of his rehabilitation within three years under sub. s. However, in the case at bar the stay was vacated by the order of March 23rd, and, *since no motion for a new trial was made, and no appeal taken within the time required, or at all, such order became final, binding and impregnable to subsequent attack, no matter how erroneous* that order may have been. Bernards v. Johnson, 314 U.S. 19, 62 S. Ct. 30, 86 L.Ed. , 47 A.B.R., N.S., 130. *Furthermore, the debtor here has had ample opportunity to demonstrate the possibility of his financial rehabilitation. This he has signally failed to do.* The record shows that, during the more than three years elapsing between the time the proceeding was commenced until the adjudication under sub. s, the debtor's financial condition, instead of improving, has steadily been growing worse, and the value of the bank's security under the chattel mortgage has been steadily depreciating."

"In bankruptcy, a stay of reasonable duration, and the risk naturally accompanying it, may be accepted as an incident of the proceeding, but *creditors must not be subject to irreparable injury by unreasonable suspension of their remedies.* United States Nat'l Bank v. Pamp, 8 Cir., 83 F. 2d 493, 31 A.B.R., N.S., 38; Continental Illinois Bank v. Chicago R.I. & Pac. Ry. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L.Ed. 1110, 27 A.B.R., N.S., 715. Here the bank has been stayed for a period of more than three years, during practically all of which time the debtor has *neglected the estate and ignored his obligation.* It appears from the records before the court that any further stay may, and it is reasonable to assume that it would, result in irreparable injury to the bank as a secured creditor."

"We are not concerned here with the problems that were before the Supreme Court for solution in the cases of Borchard v. California Bank, 310 U. S. 311, 60 S. Ct.

957, 84 L.Ed. 1222, 42 A.B.R., N.S. 596, and Wright v. Union Central Life Ins Co., supra. In those cases it was held error for the lower court, after an adjudication under sub. s, to vacate the stay and permit the secured creditor to foreclose until certain steps were taken under sub. s for the benefit and protection of the debtor. *Here we are dealing with the effect of an adjudication under sub. s, after a vacation of the stay and a decree of foreclosure by the bankruptcy court which became final and conclusive before the debtor's amended petition was filed for adjudication under sub. s.*"

X

The Debtors Are Estopped from Procuring the Benefits of Subsection (s) Insofar as The Federal Land Bank of Berkeley, the Federal Farm Mortgage Corporation and Their Securities are Concerned

Following the hearing on March 21, 1941, the debtors, through their attorney, represented to Appellees that, if the Randolph Marketing Company was permitted to take the grapefruit then growing on the premises, they would abandon the property, let the case go by default, and permit the matter to be terminated in any manner satisfactory to Appellees. By reason of these representations, Appellees were led to believe that following the harvesting of the 1941 grapefruit crop there would be no opposition to foreclosure under their deeds of trust, and, accordingly, permitted the Randolph Marketing Company to harvest said grapefruit crop and retain the proceeds thereof, went into possession of the property under the Possession Agreement signed by Florence D. Smith and the order signed by the Conciliation Commissioner, expended substantial sums in the care and preservation of the property, and made no attempt to bring the question as to the debtors' right to amend under Subsection (s) to an early determination. By reason of the debtors' promises and actions, the stay of proceedings under Subsection (s), if the debtors are entitled to such stay, will begin more than a year later than it would have begun had it not

been for the promises and actions of the debtors. To permit them to procure the benefits of Subsection (s) at this late date would be to reward them, for their lack of good faith, with the possession of their property for an additional year or two without the obligation of paying rental therefor.

In 8 *C.J.S.* 431, the equitable nature of bankruptcy courts is well stated:

> "The court endeavors to do equity whenever possible; it is armed with equity powers in aid of its jurisdiction and the enforcement of its orders; *equitable doctrines and principles prevail therein and are controlling;* and the court will not permit itself to be used for the purpose of perpetrating a fraud or attaining an inequitable result."

The District Judge held against Appellees on the ground that there had been no showing of contumacious acts by Appellants. The word "contumacious" was injected into Section 75(s) by Mr. Justice Douglas in *Wright* v. *Union Central Life Ins. Co.,* 61 S. Ct. 196. However, in doing so the Supreme Court committed an error which has so often been condemned—judicial legislation. The word was read into the last sentence of Section 75(s)(3). A cursory or a studied reading thereof will conclusively prove that Congress did not base the relief therein provided on any *contumacious* act on the part of the debtors. It is plainly and simply provided what may happen, if the debtors fail to comply with the provisions of the section or with the orders of the court.

In conclusion it is respectfully submitted that on several separate grounds the order of the District Court authorizing Appellees to proceed with the enforcement of their liens in the State court should be affirmed.

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